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FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO MOTIONS TO AFFIRM

Appellees seek to have this Court affirm, without argument, a judgment of a divided three-judge district

court which permanently enjoined enforcement of a portion of the Rules and Regulations of the Federal Communications Commission which establish a licensing policy with respect to the broadcast of lotteries (110 F. Supp. 374).

The motions to affirm would foreclose full consideration by this Court of a substantial issue of importance to the administration of the Communications Act which has not heretofore been ruled upon by this Court. These are appeals of right to the only Court to which appeal is permitted by law; yet appellees erroneously treat the appeals as if they were to be judged by the criteria for passing upon a petition for writ of certiorari. To show that the issue raised is too frivolous to merit more than summary consideration, it would seem that, at the least, appellees must establish that the closely reasoned dissenting opinion of the distinguished circuit judge who presided below is patently unsound.[1] This burden has not been met; instead appellees focus attention upon the assertedly anomalous situation in which an agency charged with regulation of the communications industry is seeking from this Court an interpretation of a criminal statute. But the criminal statute in question had its genesis as an integral part of the Communications Act, and it relates exclusively to broadcasting, a matter peculiarly subject to the Commission's jurisdiction. Indeed, violators of the Act will frequently be licensees of the Commission.

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[1] We are not aware of any case in which this Court has summarily affirmed the decision of a divided three-judge court on a question not previously passed upon by this Court. Appellees seem to disregard this overwhelming obstacle to their present motions; indeed appellee National Broadcasting Company, Inc. (NBC) actually fails to discuss the dissenting opinion below.

It was manifestly appropriate (as all three judges below agreed) [2] for the Commission to interpret and to give effect to this statute in formulating radio station licensing policies. It is equally appropriate for this Court to pass finally and authoritatively on the validity of that interpretation.

I

The basic contention of appellees—that the applicable law is so clearly settled that any further consideration by this Court is superfluous—must be laid to wishful thinking. The role of consideration as an element of a lottery or other similar scheme has never been definitively determined under federal law, and it varies from jurisdiction to jurisdiction under state practice, depending in considerable degree upon statutory differences.

At the outset it must be noted that, unlike a number of state statutes, the statute here involved makes no mention of consideration—valuable or otherwise. 18 U.S.C. 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of,

[2] The district court unanimously sustained the statutory authority of the Commission to promulgate rules pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries, and to interpret 18 U.S.C. 1304. It also sustained the Commission's interpretation of Section 1304 with respect to the elements of chance and consideration, except as to subdivisions (2), (3) and (4) of paragraph (b) of the rules. By a divided vote, the court ruled that these subdivisions, which define consideration in terms of listening to, or viewing, programs, incorrectly interpret 18 U.S.C. 1304.

> any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

Thus the many cases which give effect to specific statutory requirements that there be monetary or other valuable consideration are of little help in interpreting the federal statute. Secondly, it must be stressed that 18 U.S.C. 1304 is not limited in coverage to schemes which are technically lotteries at common law. Congress was concerned to reach all schemes "savoring of a lottery";[3] accordingly it wisely included a prohibition against other "similar schemes" as well as lotteries.

Appellees apparently argue that the "similar schemes" provision is irrelevant. This argument is untenable. Appellee Columbia Broadcasting System seeks to achieve this result by asserting that the Commission's Report and Order adopting the rules at issue did not rely upon that provision. This contention is unfounded. The Report and Order clearly shows

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[3] See S. Rep. 10, Part 1, on S. 2982, 60th Cong. 1st Sess. (p. 22), referring to the revision and consolidation of the Penal Code in 1909 "so as to bring within the operation of the section all schemes savoring of a lottery." The revised section there referred to contained the language of Section 1304.

that while the Commission felt that the schemes proscribed fall within the category of lotteries, "that in any event the types of schemes covered by our interpretative rules are within the scope of the statute, whether it be narrowly read in terms of the requisites for lotteries, or whether it be more broadly read" (Appendix, infra, p. 27).[4]

Alternatively, appellees seek to limit the effect of "other similar schemes" by resort to the familiar principle that criminal statutes are to be strictly construed.[5] This principle, however, cannot be used to cripple the purpose of Congress to forbid a general class of acts. The recent decision of this Court in *United States* v. *Alpers*, 338 U.S. 680, is closely in point. In construing a similar comprehensive phrase ("or other matter of indecent character") in an obscenity statute, this Court quoted with approval (p. 683) the statement in *Gooch* v. *United States*, 297 U.S. 124, 128, that "while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." With full knowledge of the constant attempts to evade anti-lottery laws, Congress wisely used the term "similar schemes" to avoid the possibility of an over-technical construction which might nullify the statute's effectiveness.

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[4] For the convenience of the Court the Report and Order is set out in full in the Appendix, *infra*, p. 17.

[5] The case of *United States* v. *Halseth*, 342 U.S. 277, cited by appellee National Broadcasting Company as an example of attempted administrative enlargement of the scope of a statute, is not in point here. It held that the paraphernalia actually sent through the mails in that case was not part of an existing lottery, although it might later be so used. There is no such problem here. The radio giveaway schemes covered by the Commission's rules are presently existing lotteries brought to fruition during the programs.

We submit that the end in view in prohibiting lotteries or other similar schemes clearly comprehends radio giveaway programs of the types covered by the Commission's rules. These programs have the definite purpose of benefitting their sponsors by utilizing the age-old appeal of gambling and get-rich-quick schemes —the chance to get something for nothing or almost nothing. Each of the schemes proscribed contains as an obvious or latent quality the traditional element of exploitation of cupidity and the love of gambling which is characteristic of lotteries and similar devices.

In our Statement as to Jurisdiction we quoted the following convincing reasoning of Judge Clark, dissenting below. We believe that the opinion of the majority and the motions to affirm may be searched in vain for an effective answer to this statement (110 F. Supp. at 392-393):

> My brothers, it seems to me, are drawn away from the natural answer by the odd mistake that what is involved as the "price" or "valuable consideration" (terms themselves constituting an overprecise formulation of the issue, as I have pointed out) is not value "to the station or sponsor", but "It is the value to the participant of what he gives that must be weighed". Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to

> hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense.

Judge Clark's analysis recognizes that the essential distinction between a lottery and an eleemosynary project involving distribution of gifts by chance is whether the scheme is one designed to reap a profit for the promoter. Lotteries are designed to make a profit—directly or indirectly. And that profit is contributed by the participants in the lottery—directly or indirectly. The radio giveaway schemes at bar meet these tests. As the Commission's Report and Order points out (Appendix, *infra,* pp. 27-28), commercial radio broadcasts seek to attract listeners because listener volume is important in securing sponsors for radio time, and the sponsor wants as large an audience as possible to hear his advertising message. The person who is induced to listen by the hope of prizes is conferring a real benefit upon the station and the sponsor. And in the long run, the radio audience as a whole *pays for the prizes* given away and more besides through purchases of the spon-

sored goods. Advertisers buy advertising because it pays.

It is thus apparent that there is consideration present in the time and effort contributed by the listeners, and there is substantial consideration received by the sponsor and the station from the increased listening audience. The court below and appellees apparently regard this consideration as insubstantial. Yet Judge Clark pointed out that a penny would be sufficient consideration to support a lottery and that the majority below apparently recognized that fact. We submit that the difference between the Commission's interpretation of the law on the one hand and that of the majority below and of appellees on the other is not one of broad versus strict interpretation. It is, as Judge Clark, suggested, a rational versus an irrational approach.

We turn now to the authorities which, appellees contend, overwhelmingly support the decision below.

II

There are a plethora of authorities on the place of the element of consideration in lotteries, but the collection of cases proves, as Judge Clark stated below, a somewhat "barren task." This is partly because of the differing statutes on the subject in the various states, and partly because many of the cases have uncritically stated the criteria of lotteries without analysis. A study of the authorities makes clear, however, that (1) there is almost no authority upon the precise issue raised by the case at bar,[6] and (2) the rationale of the

[6] In 1939 the Circuit Court of Peoria County, Illinois, held that a radio program called "Musico" was not a lottery. *Clef, Inc.* v. *Peoria Broadcasting Company.* (Unreported. See Exhibits B-1 and B-2 to Affidavit of Max Freund in support of motion of Columbia

better reasoned cases supports the thesis of the Commission that where a scheme is designed to bring profit to its promoter from the participants directly or indirectly, and where the participants are lured by prizes to be distributed by chance, a lottery exists.

The *only* decision of a Federal court relied upon by the majority of the district court below for the principle that a "price" must be paid is *Garden City Chamber of Commerce* v. *Wagner,* 100 F. Supp. 769 (E.D.N.Y.). There the district court, in construing a Postal Bulletin requiring "an expenditure of substantial effort or time," found that looking into store windows to find a number entitling the participant to a prize was not consideration. The decision adopted a principle not advocated by the majority below or by any of the appellees, i.e., that lottery consideration consists of a "contribution in kind to the fund or property to be distributed." A stay pending appeal was denied by the court of appeals after a brief hearing on the motions calendar, Judge Clark dissenting (192 F. 2d 240 (C.A. 2)), and the appeal was subsequently not pursued. See 104 F. Supp. 235. The case therefore never had a hearing on the merits before the court of appeals. To say the least, *Garden City* would be a weak reed upon which to base a summary disposition of the present case.

The majority below cited nine decisions by State courts as sustaining its theory of lottery consideration. Five of these decisions (*People* v. *Shafer,* 160 Misc. 174, 289 N.Y.S. 649, aff'd. 273 N.Y. 475, 6 N.E. 2d 410; *People* v. *Burns,* 304 N.Y. 380, 107 N.E. 2d 498;

Broadcasting System for summary judgment.) We are aware of no other case on "giveaway" programs.

State ex rel Stafford v. *Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. 2d 689; *People* v. *Cardas*, 137 Cal. App. Supp. 788, 28 P. 2d 99; *State of Kansas ex rel. Beck* v. *Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929) involved state statutes in terms requiring a "valuable" consideration or monetary payment and are of no assistance in interpreting 18 U.S.C. 1304, which has no such requirement. The other four, which are drawn from a large number of conflicting cases with respect to various forms of "Bank Night", are believed to have looked uncritically to the form rather than the substance of the scheme involved. Indeed, in *Griffith Amusement Co.* v. *Morgan*, 98 S.W. 2d 844 (Tex. Civ. App.), the court apparently recognized that the essential difference between a lottery and a non-lottery was whether there was a truly gratuitous offering, but failed to look at the scheme itself to see whether there was a true gift.

Appellee American Broadcasting Company finds it "unnecessary to review the authorities on the question of consideration as an element of a lottery, in view of Judge Leibell's comprehensive presentation of the authorities in his opinion in the District Court".[7] The other appellees apparently found it necessary to buttress the authorities cited by the district court. But

[7] Appellee American Broadcasting Company contends that the Post Office Department has consistently construed lottery consideration as a tangible and valuable consideration. How it can do so in the face of the Post Office's position in the *Garden City* case, *supra*, and the Postal Bulletin there quoted (100 F. Supp. at 771) providing that consideration may involve "an expenditure of substantial effort or time", is difficult to see. The most recent Postal Bulletin (Appendix, *infra*, p. 33) shows that the Department adheres to its general position on consideration, except as that position is cast in doubt by the *Garden City* decision and the decision presently under appeal.

their search unearthed just three decisions by Federal courts on Federal law. Of these, one, *Eastman* v. *Armstrong-Byrd Music Co.*, 212 Fed. 662 (C.A. 8) involved no payment of any kind.[8] Despite this fact, the court stated that consideration had been conceded and decided the case *entirely* upon the element of chance. The second, *Peek* v. *United States*, 61 F. 2d 973 (C.A. 5) also revolved entirely upon the element of chance, although the opinion contained dicta with respect to valuable consideration.

The third case, *Post Publishing Co.* v. *Murray*, 230 Fed. 773 (C.A. 1), *cert. den.*, 241 U.S. 675, is the only one at all in point. It involved a scheme where a newspaper published headless photographs of women shoppers, who might, upon identifying themselves, come to the newspaper and receive $5. The court somewhat casually dismissed the scheme as playful. It found little or no chance, and no intent to induce members of the public into buying anything, which it stated to be the critical element, although the circulation of the paper might be increased. Obviously the schemes to which the Commission's rules apply are designed to induce the giveaway program listeners to buy the products advertised over those programs.

That the claimed overwhelming unanimity of authority is actually overwhelming disparity in the approach of different courts to the problem is readily apparent. Appellees apparently base their insistence that consideration must be a paid "price" upon the

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[8] In the scheme there considered some prizes consisted of merchandise for which no money had to be paid; other prizes consisted of a voucher entitling the winner to purchase a piano at a discount. No one paid any money or other valuable consideration for the chance to win either type of prize.

theory, unsupported by any citation of legislative history, that the sole evil Congress intended to prevent in 18 U.S.C. 1304 is the improvidence and impoverishment of the public which a lottery may cause. A leading decision of this Court effectively precludes that argument. *Horner* v. *United States,* 147 U.S. 449, concerned the application of a similar Federal statute to the sale of bonds by the Austrian Government. The bonds were accompanied by a ticket entitling the holder to a chance in a drawing for the distribution of large sums in addition to the amount called for by the bond itself. No question was raised that the bonds were worth less than the price paid nor that financial loss was induced by the chance to win a prize. This Court found the scheme to be an illegal lottery, despite the absence of any element of impoverishment or improvidence. The argument had been made that there could be no lottery because there could be no final loss and the money ventured must all come back. This Court quoted with approval (147 U.S. at 462) the rejection of this argument in *Ballock* v. *State,* 73 Md. 1, a case concerning the same bonds. The *Horner* case shows that the gambling spirit engendered, and the unjust enrichment of the promoter, both of which result from schemes *apparently* offering something for nothing to the lucky winner, are major elements of evil in a lottery enterprise.

A number of courts in well-reasoned opinions have recognized the necessity of cutting through form to see if a reward is being reaped through the lure of "something for nothing" from those actually furnishing a real consideration. As did Judge Clark, they have affirmatively rejected the uncritical requirement of a pecu-

niary payment, and applied a test of real benefit to the promoter. These courts have realistically drawn a distinction, as did the Commission in its lottery rules, between the distribution of prizes as a pure gift and illegal schemes for profit which feed upon the gambling instinct. See, *e.g., Furst* v. *A. and G Amusement Co.,* 128 N.J.L. 311, 313-314, 25 A. 2d 892, 893; *Affiliated Enterprises, Inc.* v. *Waller,* 40 Del. 28, 5 A. 2d 257; *State* v. *Wilson,* 109 Vt. 349, 196 Atl. 757. The following analysis of "Bank Night" in the *Waller* case is peculiarly appropriate here:

> Motion picture theatres are not charitable enterprises. In holding out offers of an award of the kind and in the manner disclosed by the contract, they are not moved by a spirit of brotherly love, sympathy for the poor to the end that they may enjoy a more abundant life, or warmth of heart in any degree. With them it is a cold-blooded business device, embraced with hope and expectancy of filling their theatres with paying patrons. They proceed upon the notorious fact that there is nascent in the human breast a gambling instinct; that the average human is avid of an opportunity to gain much at a small risk; and that this instinct and passion is likely to blossom upon slight nourishment. (5 A. 2d at 260).

Another holding clearly *contra* to that below is contained in *Maughs* v. *Porter,* 157 Va. 415, 161 S. E. 242, where a scheme for giving an automobile by chance to one of the persons present at a real estate auction was held to be a lottery. The court said:

> The object of the defendant unquestionably was to attract persons to the auction sale with the hope

> of deriving benefit from the crowd so augmented. Even though persons attracted by the advertisement of the free automobile might attend only because hoping to draw the automobile, and with the determination not to bid for any of the lots, some of these even might nevertheless be induced to bid after reaching the place of sale. So we conclude that the attendance of the plaintiff at the sale was a sufficient consideration for the promise to give an automobile, which could be enforced if otherwise legal. (161 S.E. at 244.)

The same practical recognition of the advantage received by the promoter who seeks a greater sale of advertised goods or increased patronage at a place of business, whether or not the payment of a "price" is necessary to qualify for a prize, is present in *State* v. *Jones,* 44 N.M. 623, 107 P. 2d 324; and *Affiliated Enterprises, Inc.* v. *Gantz,* 86 F. 2d 597 (C.A. 10). As was said in *Brooklyn Daily Eagle* v. *Voorhies,* 181 Fed. 579 (C.C.E.D.N.Y.), a suit to restrain the Postmaster from refusing to accept a newspaper as second class mail,

> *The question of consideration does not mean that pay shall be directly given for the right to compete.* It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get some-

thing for nothing, are amply sufficient as a motive. [Emphasis added.] (Pp. 581-582.)

III

We believe that the foregoing discussion clearly shows that these appeals should not be disposed of summarily. It should also be stressed that the issue here is one of significant concern to the Commission in its administration of the Communications Act, to broadcasters throughout the United States, and to many of the millions of persons who regularly listen to radio and television programs. The Commission has a clear-cut duty to deny licenses to those who regularly violate or propose to violate statutes with respect to broadcasting. Because of the widespread prevalence of give-away programs [9] and because of uncertainties existing in the lottery law on this subject, the Commission undertook to formulate its interpretation of the law for the guidance of its licensees. This had the effect of placing the industry upon notice as to the types of programs deemed unlawful, and permitted the kind of orderly challenge to the Commission's rules which has taken place in the present litigation.

The clear cut issue which that litigation presents should be authoritatively settled by this Court. The future in the absence of a definitive ruling by this Court

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[9] Appellee American Broadcasting Company suggests that give-aways do not constitute a serious problem at the present time, and it may be that the appellee networks do not today broadcast as many giveaway programs as they carried when the Commission's rules were promulgated. But this type of program is one of cyclical popularity. Moreover, the relative dearth of such programs at present is no doubt largely the result of the doubt as to their legality raised by the present case.

was foreseen by Judge Clark when he said in his dissent (110 F. Supp. at 394):

> I think it therefore appropriate to reiterate by way of summary that my colleagues suggest no workable dividing line between what is "value" and what is not in deciding what the participants in these give-away schemes have themselves given. On the contrary, they seem to me to have rejected the understandable tests to which persuasive precedents point. I fear, therefore, that our decision will serve to promote more confusion that it allays.

CONCLUSION

It is respectfully submitted that these appeals raise a substantial issue of law, and that the prayers of appellees for affirmance, without argument, of the final judgment of the district court should therefore be denied.

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Federal Communications Commission.

JUNE 15, 1953.

APPENDIX

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

Docket No. 9113

In the Matter of Promulgation of Rules Governing Broadcast of Lottery Information

REPORT AND ORDER

By the Commission: (Commissioners Coy, Chairman; Hyde and Jones not participating; Commissioner Hennock dissenting).

The Commission has this day determined to adopt the attached interpretative rules, set forth in the appendix to this Report, to be designated as Sections 3.192, 3.292, and 3.692. These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U S C 1304), prohibiting the broadcast of any lottery, gift enterprise, or similar scheme, which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal thereof is qualified to operate his station in the public interest. A Notice of Proposed Rule Making concerning this subject was issued by the Commission on August 5, 1948 and a Supplemental Notice of Proposed Rule Making was issued on August 27, 1948. Interested parties were afforded an opportunity to file briefs or statements setting forth why they believe the rules should or should not be adopted and oral argument on the matter was held before the Commission *en banc* on October 19, 1948.

Two major objections have been raised to the adoption of the proposed rules. In the first place, it is alleged that the Commission is not authorized by law to promulgate Rules or Regulations setting forth the type of programs the broadcast of which the Commission believes to be within the scope of the prohibition of Section 1304 of the Criminal Code and, therefore, contrary to the public interest. It has also been argued that even if the Commission possesses such rule-making authority, the particular rules proposed by the Commission do not, as a matter of substantive law, set forth violations of Section 1304. After careful consideration of these contentions, we have concluded, for the reasons set out below, that they are without merit and that the Rules should be adopted.

I

On the question of jurisdiction to promulgate the rules, we are able to reach the conclusions that the status of the prohibition on the broadcasting of lottery, gift enterprise, and similar schemes as a provision of the Criminal Code does not affect the fact that it is an important declaration of public policy by Congress in the broadcast field; that the Commission is under a duty to give effect to such public policy in its licensing functions; that this duty must be performed even where other agencies or the courts have concurrent powers which have not been exercised in the particular case before the Commission; that the Commission may in the exercise of authority under Section 4(i) and 303(r) of the Communications Act, set out in interpretative rules for the information and guidance of licensees and other interested persons, its interpretation of a statute, expressing public policy in the broadcast field and,

therefore, an aspect of the standard of the public interest to be applied in licensing proceedings under Sections 307, 308, and 309 of the Communications Act; and that the issuance of such interpretative rules is in accordance with the provisions of the Administrative Procedure Act.

Section 1304 is itself a criminal provision making the broadcast of any lottery, gift enterprise or similar scheme by any broadcast licensee punishable by fine, imprisonment or both. It does not differ in this respect from the former Section 316 of the Communications Act which carried its own express penal sanctions. The reenactment of the substance of Section 316 of the Communications Act as Section 1304 of the Criminal Code on July 25, 1948, by Public Law 772, 80th Congress, 2nd Session, as part of a general recodification of the criminal law was not intended to affect, and did not in any way affect or change the impact of the prohibition against the broadcast of lottery information as a criminal prohibition expressing the public policy of the United States against the broadcasting of such programs. Both Section 1304 and the former Section 316 impose a duty upon the Department of Justice to prosecute apparent violations of the prohibition coming to its attention and, similarly, impose an obligation upon this Commission, as the agency of the federal government most closely in touch with the day-to-day operation of radio broadcasting, to refer those violations of the Section which come to its attention to the Department of Justice for appropriate action. It has been suggested that such periodic reference to the Department of Justice of apparent violations of law is the only obligation imposed upon this Commission, but this is clearly not so. Violation of any provision of law by a broadcast licensee or prospective licensee

obviously is relevant to a determination as to whether such person has the requisite character qualifications of a licensee and to operate a station in the public interest. *Mester Brothers* v. *United States,* 70 F. Supp. 118, *affirmed,* 332 U.S. 749; see *Southern Steamship Company* v. *National Labor Relations Board,* 316 U. S. 31. This is especially true when the law involved deals directly with broadcasting and expresses a public policy so clear and strong that violation is made a criminal offense.

It is equally clear that the Commission may consider any violation of the prohibition against the broadcast of lottery information whether or not there has been a prior judicial determination in the particular case. *National Broadcasting Company* v. *United States,* 319 U.S. 190; *Southern Steamship Company* v. *National Labor Relations Board,* 316 U.S. 31, *Cf., Public Clearing House* v. *Coyne,* 194 U.S. 487. As the Supreme Court pointed out in the *Southern Steamship* case, *supra,* at pp. 46-47, the respective administrative agencies have an individual responsibility for giving effect to the public policy of the nation expressed in statutes other than their own, which cannot be avoided or postponed until some other agency or branch of the government, which may also have a responsibility arising out of the same legislative mandate, has acted.[1] In the

[1] In the course of the legal attack upon the Commission's Chain Broadcast rules a similar claim was made that the Commission could not consider activities which might possibly constitute unconvicted violations of the antitrust laws since, under Section 311 of the Communications Act, it was authorized to refuse a license to any person who had been found guilty of violating these laws. In rejecting this argument and upholding the right of the Commission to promulgate its rules the Supreme Court stated: (*National Broadcasting Company* v. *United States,* 319 U.S. 223)

> A licensee charged with practices in contravention of this standard [public interest, convenience or necessity] cannot con-

present case, the relevant facts so far as the Commission is concerned, are that Congress in its enactment of Section 1304 and its predecessor, Section 316 of the Communications Act, has clearly determined that broadcasts of lotteries, gift enterprises, or similar schemes are not in the public interest; the additional determination that the carrying of such broadcasts may subject the offender to imprisonment or payment of fine does not in any way limit the Commission's responsibility to give heed to the explicit Congressional declaration as to the public interest in the broadcast field.

It has been argued that, whatever power the Commission might have to consider violations of the provisions of Section 1304 on a case-to-case basis, it may not adopt general rules setting out in advance for the information of licensees the course of action it intends to pursue. In our opinion, the determination to issue interpretative rules rather than to enunciate its views from case-to-case is not only proper but, under the circumstances, the only reasonable course for us to have taken. It should be made clear that these rules are not intended to require any licensee to refrain from taking any action which is not already forbidden by statute. They merely set forth, to the extent that any general statement is possible, the Commission's interpretation of the existing Congressional mandate with respect to broadcasts of lotteries, gift enterprises, and

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tinue to hold his license merely because his conduct is also in violation of the antitrust laws and he has not yet been proceeded against and convicted . . . Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest" merely because its misconduct happened to be an unconvicted violation of the antitrust laws.

similar schemes. As such, they will provide licensees with information by which they may better determine, in advance of Commission action in licensing proceedings, the interpretation of the law which the Commission will follow in determining the legality of particular programs in licensing proceedings.

In view of the almost infinite variety of program format details possible in connection with "give away" schemes, interpretation of the statute solely on a case-to-case basis may readily leave licensees in deep confusion as to the applicability of the statute in situations other than the precise scheme involved in a particular case. But despite the variety of possible details, a number of common recurrent features, which embody the elements at which the statute is aimed, can be identified in order to clarify the application of the statute in particular situations. Announcement of interpretative rules in an area where the details may obscure the more general principles which are readily identified, thus serves both to diminish the perils of uncertainty and to remove the refuge of the opinion of counsel, which may vary not only with different cases, but with different counsel. Just as the licensee is entitled to come before the Commission and state that he relied on the opinion of counsel in determining what was illegal and contrary to the public interest, so the Commission may afford the licensee guidance by stating what it believes the law to be in the form of interpretative rules.

Since any such interpretative rules are controlling in any court review only to the extent that they are found by a reviewing court to embody a proper interpretation of the law they purport to interpret, *Cf. Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, adoption

of the rules may make available to persons who may have property interests directly and immediately affected adversely by their adoption an opportunity to secure a judicial determination of the validity of any such application of the rules in advance of Commission action in licensing proceedings and without the expense, delay in time and licensee jeopardy which would be involved if the Commission's interpretation of the law were to be developed and disclosed only in the course of such proceedings. *Cf. Columbia Broadcasting System* v. *United States,* 316 U.S. 407.

Sections 4(i) and 303(r) of the Communications Act expressly authorize the Commission to make such rules and regulations, not inconsistent with "this Act" or "law", as may be necessary either "in the execution of its (Commission's) functions", or "to carry out the provisions of this Act." The claim that in spite of these provisions the Commission, in the exercise of its licensing functions must announce applicable principles of law only on a case-to-case basis and may not issue general rules setting forth its understanding of the applicable law to be applied to recurring general problems of interest and importance to all licensees and applicants, has been expressly rejected by the courts. See *National Broadcasting Company* v. *United States,* 319 U.S. 190 *affirming* 47 F. Supp. 940; *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 420-421; *Heitmeyer* v. *Federal Communications Commission,* 68 App. D.C. 180, 95 F. 2d 91; *Ward* v. *Federal Communications Commission,* 71 App. D.C. 166, 108 F. 2d 486; *Cf. Stahlman* v. *Federal Communications Commission,* 75 App. D.C. 176, 126 F. 2d 124; *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194; *Lichter* v. *United States,* 334 U.S. 742. As Judge

Learned Hand stated for the District Court in the *National Broadcasting* case, supra, (47 F. Supp. 945):

> The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future.

These considerations are applicable with even greater force where the administrative agency is not promulgating rules which constitute an exercise of delegated authority to forbid or require specified conduct on the basis of findings as to the public interest in the particular field, as in the *National Broadcasting Company* case, *supra,* but is rather issuing interpretative rules for the purpose of stating its understanding of what Congress itself has found to be contrary to the public interest and has itself forbidden.

What we have said above disposes of the claim that the adoption of these rules would be in violation of Section 9(a) of the Administrative Procedure Act, 5 U.S.C. 1009 which provides that "no sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law." As the legislative history of the provision makes clear, Section 9(a) was not intended to prohibit the issuance of any rules which an agency would otherwise be authorized to issue but was merely designed to "afford statutory recognition for the basic rule of law embodied in judicial decisions." *Senate*

Judiciary Committee Print, June 1945, in *Sen. Doc. No.* 248, 79th Cong. 2d Sess. p. 34. See also *Sen. Doc.* No. 248, p. 229 *(Attorney General's Interpretation).* And both the Senate and House Reports on the bills, which became the Administrative Procedure Act, made clear that Section 9(a) was intended to prevent agencies from imposing types of sanctions which they had not been specifically or generally authorized to impose. Thus, if the Commission had not been given authority by Sections 4(i) and 303(r) to issue such general rules and regulations as might be necessary in the performance of its duties, and if sections 307, 308, and 309 of the Communications Act did not authorize the Commission to consider relevant aspects of the public interest in licensing proceedings, Section 9(a) of the Administrative Procedure Act would have prevented the Commission from assuming such rule-making power just as it prevents the Commission from issuing cease and desist orders in the absence of authority to do so. See Senate Report on S. 7 in *Sen. Doc.* 248, 79th Cong. 2d Sess. p. 211 and House Report on S. 7 in *Sen. Doc.* 248, 79th Cong. 2d Sess. p. 274. While the Senate Report, *supra,* makes clear that Section 9(a) of the Administrative Procedure Act prohibits one agency from exercising the functions of another, these rules, as indicated above, are not an enforcement of the Department of Justice's authority to prosecute violations of Section 1304 of the Criminal Code, but an aid to the exercise of the Commission's independent jurisdiction and authority to license applicants for station licenses when, and only when, the grant of such application would serve the public interest, convenience, or necessity.

II

After examination of the arguments presented, the Commission is convinced that the features of programs covered by the proposed rules come within the scope of the language "lotteries, gift enterprises, or similar schemes dependent in whole or part on lot or chance" set forth in Section 1304 of the Criminal Code. For the purposes of considering whether the rules before us are a proper interpretation of the statute, it is unnecessary to resolve the question of the extent to which the statutory terms "gift enterprises or similar scheme" may include more than the statutory term "lotteries". For, in interpreting the statute we conclude that the statutory term "lottery" includes more than the popular conception of "lottery" in which the opportunity of participating in the selection of a winner of prizes is itself purchased and paid for in cash. This view is borne out by the case of *Horner* v. *United States,* 147 U.S. 449. Since the proposed rules all deal with situations which contain in some manner all of the three elements of prize, chance, and some form of consideration, which have been held by the courts to be the essential features of lotteries, it is unnecessary to resolve the open question of whether the statutory terms are intended to cover a wider area.[2]

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[2] It must be recognized that the statute itself does not prescribe the element of consideration. The statute itself therefore leaves open the view that any scheme containing the characteristics of "offering prizes dependent in whole or in part on lot or chance" is within the scope of its prohibition, and that the language "similar scheme" refers to the common possession of these characteristics and is not intended to limit the application of the statute to such schemes as are found to possess all the elements of lotteries, in addition to those aspects of lotteries which are identical with the characteristics which are in terms described in the statute. However, we leave this question open, for we do not now intend to foreclose by these interpretative rules a judicial conclusion that we have not

The element of "prize" raises no substantial problem—all of the program schemes described in the rules involve the distribution of money or other valuable prizes. There is similarly no serious question concerning the element of chance. While there are many bona fide contests open to all in which the element of skill is primarily determinative of the winner or winners of the prizes which the statute does not forbid, in each of the cases set forth in the attached rules the element of chance determines in whole or in part the identity of the persons to whom the prize is to be awarded.

The only substantial issue presented is whether such programs also involve the element of "consideration", assuming it to be a necessary element of schemes forbidden by the statute. We think that in each of the instances specified by the rules, consideration of some form is present. While only category "1" requires a prospective winner to have directly contributed money or purchased goods as a condition of success, it has been clear ever since the decision of the Supreme Court in *Horner* v. *United States*, 147 U.S. 449 (1893) that no such restricted definition of the term "consideration" is applicable to the problem and that a scheme may come within the scope of the statutory prohibition, which offers prizes dependent upon lot or chance even where the participants in the schemes are not risking the loss of any money through their participation.

In determining whether the element of consideration is present in any radio "giveaway" schemes, we must consider the problem in context of the unique nature

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covered as many situations as the language and intent of the statute extend to. We believe that in any event the types of schemes covered by our interpretative rules are within the scope of the statute, whether it be narrowly read in terms of the requisites for lotteries, or whether it be more broadly read.

of the medium of radio. Unlike the motion pictures and theatre, no charge is made by the licensee to members of the public for access to any programs. Nor, as in the case of newspapers and magazines, must a copy of a publication be purchased to secure the information, entertainment and advertising presented. Section 3(o) of the Communications Act defines "Broadcasting" as "the dissemination of radio communications intended to be received by the public . . ." Most licensees support their operations by the sale of time to advertisers who seek to reach the public.[3] We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as determined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create "circulation" as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's advertising message may be delivered and the listener induced to purchase the sponsor's product or service.[4] In this context, pre-occupation with such forms of furnishing of consideration to the advertiser, by such means as the purchase of his product or the furnishing of box tops as a condition precedent to participation in a scheme may obscure the valuable benefit furnished to the licensee in the form of "circulation" when the listener is induced by a scheme for the awarding of prizes based

[3] *Public Service Responsibility of Broadcast Licensees*, 40-41.

[4] In the opinion of the Supreme Court in *Federal Communications Commission* v. *Sanders Brothers*, 309 U.S. 470, Mr. Justice Roberts observed:

> Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

on chance to listen to a particular station and program. *Cf. Brooklyn Daily Eagle* v. *Voorhies,* 181 Fed. 579, 581-582 (C.C. E.D. N.Y.). Where such a scheme is designed to induce members of the public to listen to the program and be at home available for selection as a winner or possible winner, there results detriment to those who are so induced to listen when they are under no duty to do so. And this detriment to the members of the public results in a benefit to the licensee who sells the radio time and "circulation" to the sponsor, and to the sponsor as well, who presents his advertising to the audience secured by means of the scheme. When considered in its entirety, a scheme involving award of prizes designed to induce persons to listen to the particular program, certainly involves consideration furnished directly or indirectly by members of the public who are induced to listen. Any supposition that there must be a direct sale or other form of contract before a scheme involving some form of consideration is presented does not take into account the nature of the medium of broadcasting and its economics. We do not believe that Congress in announcing a public policy particularly applicable to the field of broadcasting intended only to proscribe schemes designed for other media such as direct solicitation or publications, and intended that the relevant legal analysis should not take into account the nature of the medium of radio.

ACCORDINGLY, IT IS ORDERED this 18th day of August, 1949, that Sections 3.192, 3.292 and 3.692 as set forth in the attached appendix be adopted effective October 1, 1949.

BY DIRECTION OF THE COMMISSION,
T. J. SLOWIE,
Secretary.

Attach.
Released: August 19, 1949.

Appendix

The following is the text of Sections 3.192, 3.292 and 3.692

Lotteries and Give-Away Programs—(a) An application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See 18 U.S.C. § 1304).

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

DISSENTING VIEWS OF COMMISSIONER HENNOCK

I believe that the Proposed Rules should not be adopted. These rules purport to interpret for the benefit of broadcast licensees Section 1304 of the Criminal Code which prohibits, with criminal sanction, the broadcast of "any advertisement of or information concerning any lottery, gift enterprise or similar scheme offering prizes dependent in whole or in part upon lot or chance."

The concept of "lottery" has a long legal history. This provision, or one similar thereto, appear in the statutes of virtually every state, and have frequently been applied by both federal and state courts. It is quite evident from the report of the majority in this proceeding that the Commission's interpretation of the

term "lottery" is novel in at least one respect. This is the first instance in which a scheme has been called a lottery when the sole consideration supporting it is nominal or other than the payment of something of value. Even in the "Bank Night" cases, *e.g., Commonwealth* v. *Lund,* 15 A. (2d) 839, although particular individuals were allowed to participate without the purchase of a ticket or the payment of any valuable consideration, such consideration was paid by the great mass of the participants. Our Proposed Rules would comprehend situations in which none of the participants risked anything of value.

I do not believe it proper for an administrative agency to broaden the interpretation of a criminal statute any further than has been done by the courts. If the so-called "giveaway" programs, at which these Rules are ostensibly directed are, in fact, in violation of Section 1304, I believe this should be determined by a court after proper evaluation in a particular case. Since the lottery prohibition which was formerly Section 316 of the Communications Act of 1934, as amended, has been deleted from the Act which sets forth the duties and powers of this agency, I feel that, without a specific mandate from Congress for us to curb the prevalence of this type of program, our action today is unwarranted. For this reason, I suggest that the matter be brought to the attention of the Congress and of the Department of Justice for any action which they may deem appropriate to have taken.

Excerpt from Postal Bulletin No. 19642, of June 4, 1953

INSTRUCTIONS OF THE SOLICITOR

RULINGS ON LOTTERIES, GIFT ENTERPRISES, ETC.

In the Postal Bulletin of February 13, 1947, the following statement was made of the position of the Office of the Solicitor respecting the element of consideration in a lottery:

> "In order for a prize scheme to be held in violation of this section (36.6, P. L. & R., 1948), it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present."

There have been two recent decisions in the Federal courts dealing with the question of consideration in a lottery: *Garden City Chamber of Commerce* v. *Wagner,* 100 Fed. Supp. 769, wherein it was held that a requirement that participant visit a number of stores to determine if his number is posted in one of the store windows, thereby entitling him to a prize, does not constitute a consideration for a prize, and that such a scheme is therefore not a lottery; *American Broadcasting Co., Inc., et al.* v. *Federal Communications Commission,* 110 Fed. Supp. 374, dealing principally with requirements of listening to the radio or watching television programs.

This office will continue to hold that the element of consideration is present in a prize scheme when a substantial expenditure of time and effort is involved. However, in view of the court decisions referred to, this office must reverse its rulings which have held consideration to be present in the following and similar situations: where the sole requirement for participation is registration at a store and, in addition, attendance at a drawing or a return to the store to learn if one's name was drawn; visiting a number of stores, or a number of different locations in a store, to ascertain whether or not one's name or number has been posted; witnessing a demonstration of an appliance or taking a demonstration ride in an automobile, etc.

Postmasters should therefore exercise caution in applying previous rulings of this office in prize plans involving consideration only in "time and effort" expended. If there is doubt with respect to any of these questions, the matter should be submitted to the Solicitor so that a definite ruling may be made thereon.

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